No. 80-1968

Office-Supreme Court, U.S.
FILED
MAY 7 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAVID RUSSELL HUDSON, Petitioner

v.

UNITED STATES OF AMERICA and its Secretary of the Interior, THOMAS S. KLEPPE, and, VERNADINE REED STEARNS, LOIS JEAN REED SAXTON, MILDRED REED ANDERSON, and IVAN STACY REED CLEVELAND, Defendants.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

Attorney for Petitioner:

ROBERT F. PECK
Bitar Building
623 Simpson Avenue
Hoquiam, WA 98550
(206) 533-2970

Question Presented

Does the United States District Court have jurisdiction to review the decision of the Secretary of Interior on the estate of an intestate Indian when the Secretary violates statutory procedural requirements which affect the decision.

TABLE OF CONTENTS

		Page
I.	Opinions Below	1
II.	Jurisdiction	1
III.	Statutes, Federal Rules and Regulations Involved	1
IV.	Statement of the Case	4
	a. Course of Proceedings	4
	b. Revelant History and Facts	7
V.	Existence of Jurisdiction Below	12
VI.	Argument	14
VII.	Conclusion	23

Appendix, following Conclusion

TABLES OF AUTHORITY

Table of Cases

Accardi v. Shaughnessy, 397 U.S. 260 74 S. Ct. 499, 98 L. Ed 2d 681 (1954) 13

Art National Manufacturers Distributing Company v. FTC, 298 F. 2d 476 (2d Cir. 1962), cert. denied 370 U.S. 939 (1962) 19

Breen v. Selective Service Board, 396 U.S. 460, 90 S. Ct. 661, 24 L. Ed. 2d 653 (1970) 13,15

Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 887 ( ). 22

Delaware Tribal Business Committee v. Meeks, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 ( ). 22

First Moon v. White Tail, 270 U.S. 243, 46 S. Ct. 246, 70 L. Ed. 565 (1926). 14,15

Gamble-Skogmo, Inc. v. Federal Trade Commission, 211 F. 2d 106 (8th Cir., 1954) 19

Graham v. Caston, 568 F. 2d 1092 (5th Cir., 1978) 13

Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 ( ) 22

Hayes v. Seaton, 106 U.S. App. D.C. 1266, 270 F. 2d 319, 322 (1959) 16

Harmon v. Bruckner, 355 U.S. 579, 78 S. Ct. 433 2 L. Ed. 2d 503, (1958) 14

In Re Murchison, 349 U.S. 133 at 136, 99 L. Ed. at 942, 75 S. Ct. at 623, (1955). 21

Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 298 (1974) 16

Manges v. Comptroller, 474 F. 2d 97 (5th Cir., 1973) 13

Morton v. Ruiz, 415 U.S. 199 (1974).17

Ostereich v. Selective Service Board, 393 U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968) 13

Tooahnippah v. Hickel, 397 U.S. 598 98 S. Ct. 1316, 25 L. Ed. 2d 600 (1970). 15,16

Van Teslaar v. Bender, 365 F. supp. 1007 (1973) supp. at 1012 19,20

Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 ( ) 22

Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2.712, 98 S. Ct. 1456 21

Table of Statutes

ADMINISTRATION PROCEDURES ACT 17,19,24

AMENDMENT V 2,21,22

OMNIBUS INDIAN ACT OF 1910 15,23

43 CODE OF FEDERAL REGULATIONS, PART 4 16-17

5 U.S.C. §554, (Administration Proceedures Act) 17,19,24

5 U.S.C. §555(c) 14

5 U.S.C. §555(d) 3

5 U.S.C. §702, §710 12

23 U.S.C. §2201 1

25 U.S.C. §372 . . . 2,12,14,15,16,17,&23

25 U.S.C. §373. 18

28 U.S.C. §1361 1

28 U.S.C. §1254(1) 1

Table of Other Authorities

Estate of Albert Attocknie, Digest of Federal Indian Probate Law, Page 8 . . 18

Estate of Augustine Greybull (Cuts) Digest of Federal Indian Probate Law, Page 8 18

Estate of Jackson Searle, Digest of Federal Indian Probate Lay, Page 8 . . 18

Estate of Charles White, Nez Perce Allottee No. 66, Digest of Federal Indian Probate Law, Page 2 20

Opinions Below

The opinions of the District Court for the Western District of Washington at Tacoma and the opinion of the Court of Appeals for the Ninth Circuit are attached hereto.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on February 10, 1981, and a copy thereof is appended to this petition in the appendix. The jurisdiction of this Court is invoked under 5 U.S.C. Sections 710 and 702, 23 U.S.C. Section 2201, 28 U.S.C. Section 1361 and 28 U.S.C. 1254(1).

Statutes, Federal Rules and Regulations Involved

1. Petitioner asserts jurisdiction under 5 U.S.C. § 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

2. Petitioner believes that 25 U.S.C. § 372 is not a bar to review.

> When any Indian to whom an allotment has been made, or may hereinafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent and his decision thereon shall be final and conclusive. (emphasis added)

3. Petitioner believes that an interpretation of 25 U.S.C. § 372 would deny petitioner equal protection and due process under the Fifth Amendment of the United States Constitution.

AMENDMENT V [1791]

> No person shall be held to answer for a capital, or otherwise

> infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. Petitioner asserts that the Secretary of Interior exceeded his lawful authority by violating 5 U.S.C. § 555(d):

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.

Statement of the Case

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of Proceedings

Alvin Hudson died on January 13, 1949, and on December 30, 1949, an order was entered determining the heirs of Alvin Hudson.

A petition to reopen the estate of Alvin Hudson was filed by Petitioner, David Russell Hudson, on August 27, 1968. An order was entered the next day denying the reopening of the estate.

The petitioner filed an appeal to the Secretary of the Interior and the Regional Solicitor reversed the order denying the petition to reopen on May 29, 1969. As a result, two hearings were held on June 26, 1972 and April 24, 1973. These hearings were before R.J. Montgomery,

a hearing examiner for the Secretary of the Interior. Subsequent to the hearings, R. J. Montgomery died, and without notice to the parties of the death of R. J. Montgomery, a substitute hearing examiner, Robert Snashall reviewed the record and decided the case on April 9, 1975. Judge Snashall ruled favorably to the petitioner finding that he was the child and natural heir of the decedent. A petition for rehearing was filed by the original heirs on July 7, 1975, and their petition was denied on January 21, 1976.

The original heirs, appellees herein, then filed a petition asking for review to the Secretary of Interior whose designee, The Board of Indian Appeals, reversed the decision and reinstated the original heirs on September 2, 1976. A copy of that decision is Annexed hereto in the appendix to this application. The Board of Indian Appeals found that a serious

question existed regarding the credibility of petitioner's mother and chose not to believe the mother, even though they had not heard her testimony.

The Petitioner then filed a complaint on November 4, 1976, with the United States District Court for the Western District of Washington at Tacoma. On the motion of appellees, a motion to dismiss was granted by Judge Jack Tanner on March 6, 1979. The Trial Court determined it had no jurisdiction.

Petitioner filed his notice of appeal to the Court of Appeals for the Ninth Circuit on March 14, 1979. The Court of Appeals on February 10, 1981, sustained the determination of the Trial Court that it had no jurisdiction to review the decision of the Secretary of Interior.

B. Relevant History and Facts

David Russell Hudson, the illegitimate son of Alvin Hudson, has made claim to the entire trust estate of his father, who was a full blooded Quinaielt Indian, Allottee Number 1139.

That the petitoner is the son of Alvin Hudson and Helen Paskas, now Helen Jenna, and was born in Seattle, King County, Washington, on the 30th day of January, 1942. That the original birth certificate of the petitioner sets forth his name as David Russell Paskas, the son of Alvin Hudson and Helen Paskas. The birth certificate further indicates that Alvin Hudson was born in Taholah, Washington, occupation fisherman, and his residence at the time of the birth of the petitioner was Box 36, Taholah, Washington. At the time of the birth of the petitioner, the mother's mailing address was listed as 841 East 90th,

Seattle, Washington, and the usual address of the mother as 404 West Harriman, Aberdeen. That the age of Alvin Hudson was listed on David's birth certificate as 25 years. That the information for the birth certificate was furnished by the mother.

The records indicate that Alvin Hudson died intestate on January 13, 1949, at the age of 31. The mother of David Hudson, Helen Paskas Jenna, testified that she graduated from high school in Aberdeen, Washington in 1938, and from 1938 to 1942 was doing housework through referrals from the Department of Public Assistance of the State of Washington. At the time the petitioner was conceived, Helen Paskas Jenna was living with Daisy Gray at Taholah, Washington, and was doing housework for the mother and father of Alvin Hudson. It appeared that Daisy Gray was employed

by the Department of Public Assistance and she referred Helen Paskas Jenna to various housekeeping jobs at Taholah, Washington. The evidence of Helen Jenna further indicated that she became well acquainted with Mildred Hudson Reed, the sister of Alvin Hudson, and later had an association with Alvin Hudson. Her further testimony indicated that she became pregnant by Alvin Hudson and became aware of her pregnancy "about May of 1941". Although more than 32 years had elapsed, Helen Jenna's memory was quite clear in reference to the Hudson home and the Hudson family. She continued to work in the Hudson home after the child was conceived. Due to her pregnancy, she left the reservation in October or November of 1941.

After she left the reservation, Helen Jenna was employed by and lived with

Florence Hoxi who helped make arrangements with the Catholic Childrens Services in reference to placing the baby in the childrens' home. David was born in the Columbus Hospital in Seattle, Washington. During his early boyhood, David was in the Sacred Heart Home, under the Archdiocese of Seattle, was in the custody of his mother for a short time, returned to the Catholic home, and was raised in several foster homes. David's testimony of his early life in foster homes revealed unfortunate hardships which he endured during this boyhood. Finally, when David was 17 years old, he went out on his own.

When David married in 1963, he endeavored to find his true identity. Through the efforts of George Marshall, a case-worker at the Catholic Childrens Services, the Aberdeen Police Department, and an uncle, Joe Paskas, he received a letter from his mother, Helen Paskas Jenna,

dated May 16, 1965 wherein she acknowledged that she was his mother and that Alvin Hudson of Taholah, Washington, was his father. After receiving knowledge as to his true identity, he went to Taholah where he met Martha Boyer, Alvin Hudson's first counsin, and obtained information from her in reference to his father. Martha Boyer further advised David that she knew that Helen had been pregnant by Alvin, as Alvin had told her about it many years ago. On a later visit to Taholah, Washington, David Hudson, his wife, Sandra Hudson, and his family visited the home of Frank and Ellen Pickernell. Ellen Pickernell gave David a picture of his father. Sandra Hudson testified that Ellen Pickernell referred to Alvin as David's father, and further indicated that David resembled his father.

David Hudson testified that he is an enrolled member of the Quinaielt Indian

Tribe and went to the university with the aid of the Bureau of Indian Affairs.

Existence of Jurisdiction Below

The United States District Court and the Court of Appeals both held that they lacked jurisdiction to review the decision of the Secretary of Interior. Petitioner, David Hudson believes that there is jurisdiction to review the decision of the Secretary of Interior.

Congress authorized the review of the decisions of administrative agencies under the Administrative Procedure Act, 5 U.S.C. §§ 702 and 710 with the limitation of "except to the extent that (1) statutes preclude review."

The statute that authorizes the Secretary of Interior to administer intestate Indian probates in 25 U.S.C. § 372. This statute states that the decision of the Secretary of Interior shall

be final and conclusive.

The United States Supreme Court and other Federal Courts have had to construe similar withdrawal statutes. These Courts have found that if the agency clearly departs from statutory authority, the administrative action is subject to judicial review even though a jurisdictional withdrawal is otherwise applicable. Breen v. Selective Service Board, 396 U.S. 460, 90 S. Ct. 661, 24 L. Ed. 2d 653 (1970); Oestereich v. Selective Service Board, 393 U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968); Manges v. Comptroller, 474 F. 2d 97 (5th Cir., 1973); Graham v. Caston, 568 F. 2d 1092 (5th Cir., 1978).

The case of Accordi v. Shaughnessy, 397 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 2d 681 (1954) held that judicial review is available where the administrative agency faily to follow procedures outlined

in regulations adopted by the administrative agency. In this case we have an agency that had no rule or regulation on the use of substitute hearing examiners and operated solely under 5 U.S.C. § 555(c).

The case of Harmon v. Bruckner, 355 U.S. 579, 78 S. Ct. 433 2 L. Ed. 2d 503, (1958) used a different rational for avoiding a withdrawal statute. There the Court held that if the Secretary of the Army exceeded his powers, his actions would not constitute the exercise of his administrative discretion and would be reviewable.

Argument

The last authoritative construction of 25 U.S.C. by the Supreme Court was in First Moon v. White Tail, 270 U.S. 243, 46 S. Ct. 246, 70 L. Ed. 565 (1926). There, the Court held that the finality

clause barred judicial review of a misapplication of law by the Secretary of Interior in administering the estate of an Indian who died intestate. The Court viewed the finality clause as applicable to all thirty-three sections of the Omnibus Indian Act of June 25, 1910. No constitutional issues were raised in the appeal. More recent decisions which have allowed review of unlawful administrative action in the face of finality clauses raise considerable doubt as to the continuing validity of First Moon's holding that § 372 bars review of errors of law. Breen v. Selective Service Board, supra.

The First Moon interpretation that the finality clause of § 372 applied to all sections of the Omnibus Indian Act has been rejected by the Supreme Court in Tooahnippah v. Hickel, 397 U.S. 598, 98 S. Ct. 1316, 25 L. Ed. 2d 600 (1970).

The Court allowed judicial review in will cases under 25 U.S.C. § 373 because, as they pointed out, it did not have finality language similar to § 372.

The Chief Justice who was the author of Tooahnippah had previously indicated doubts on whether § 372 bars judicial review of questions of law. See Hayes v. Seaton, 106 U.S. App. D.C. 1266, 270 F. 2d 319, 322 (1959) (Burger, J., dissenting.)

A recent case, Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 298 (1974), suggests that the Supreme Court would interpret the finality clause of § 372 in a manner allowing review of errors of law if this Court were to accept this case for review.

The Secretary of Interior has established a system for the determination of Indian heirship. The rules have been published as 43 Code of Federal

Regulations Part 4.

There can be no dispute that an administrative agency which promulgates regulations must scrupulously follow them. An agency may not violate its rules and if the rule is violated, the decision cannot stand. See Morton v. Ruiz, 415 U.S. 199 (1974). This standard must obviously require compliance with statutes.

The Administrative Procedure Act, 5 U.S.C. § 554, provides that the provisions of the act shall apply in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. There is no dispute by the parties that a hearing under 25 U.S.C. § 372 to determine heirship is an adjudicatory hearing under the Administrative Procedure Act.

The substitution of a hearing examiner after all of the evidence has been

received is contrary to the decisions of the Secretary where credibility is an issue. The case of Estate of Albert Attocknie, Digest of Federal Indian Probate Law, page 8 (1972) (hereinafter cited as Digest) held that where the testimony in a probate proceeding is disputed and conflicting on the questions of paternity and of the testator's competency to make a will, the factual findings of the Hearing Examiner, who had the opportunity to observe and hear the witnesses, will not be disturbed.

The findings and conclusions of a Hearing Examiner arrived at on his determination of the credibility and verocity of witnesses conflicting testimony will not be disturbed on appeal. Estate of Augustine Greybull (Cuts), Digest, page 8, (IA-D-2).

The Estate of Jackson Searle, Digest, page 8 (IA-S-2) held that the determin-

ation of heirship involved legal principles the conclusion of the Hearing Examiner may be re-examined.

Under the Administrative Procedures Act, a substitution of examiners is allowed, but only in limited circumstances. The leading case is Gamble-Skogmo, Inc. v. Federal Trade Commission, 211 F. 2d 106 (8th Cir., 1954), where the Court held that situations of examiner unavailability should not be used to deny a proper credibility examination where it could effect the outcome.

The case of Art National Manufacturers Distributing Co. v. FTC, 298 F. 2d 476 (2d Cir. 1962), cert. denied 370 U.S. 939 (1962) (decision by a substitute examiner without a de novo hearing upheld since the findings were based upon "uncontroverted" evidence and no credibility issues were involved). In Van Teslaar v. Bender, 365 F. Supp. 1007 (1973), the

Court summarized the law as follows:

> "After considering all of the cases, this Court is satisfied that the APA allows substitution of examiners without a de novo proceeding only where the original examiner is unavailable and either (1) the case is not one in which the resolution of conflicting testimony required a determination of the credibility of the witnesses or (2) if it is a case in which the credibility is involved, the parties agree to proceed without a de novo administrative proceeding."

365 F. Supp. at 1012.

In Estate of Charles White, Nez Perce Allottee No. 66, Digest, Page 2, the Solicitor specifically held that the above principles apply in Indian probate hearings. The White case involved an Indian will contest in which the initial BIA examiner of inheritance had died after conducting probate hearings, but before any determination was made. The Solicitor ordered a rehearing holding that a de novo hearing is required

credibility of the witness is involved.

In case of Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2. 712, 95 S. Ct. 1456, stated that a fair trial in a fair tribunal is a basic requirement of due process. The due process requirement of a fair trial in a fair tribunal applies to administrative agencies which adjudicate as well as courts. See also, for the principle that a fair trial in a fair tribunal is a basic requirement of due process, the case of In Re Murchison, 349 U.S. 133 at 136, 99 L. Ed. at 942, 75 S. Ct. at 623, (1955). This doctrine applies to administrative agencies which adjudicate as well as to courts.

While the Fifth Amendment to the United States Constitution contains no equal protection clause, it does forbid discrimination by the federal government that is so unjustifieable as to be violative of due process. The federal govern-

ment like the states must govern impartially. Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 ( ). The concept of equal protection of the laws and due process of law are not mutually exclusive, both stemming from our American ideal of fairness. Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 ( ).

There must be an overriding national interest to justify a discriminatory federal statute. Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 ( ).

The United States Supreme Court has scrutinized federal Indian legislation to determine equal protection under the Fifth Amendment. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 ( ).

No rational basis exists for granting the right of judicial review to testimentary dispositions while denying the right of review for intestate succession.

CONCLUSION

A person should be entitled to look to the courts of this nation for relief when an administrative agency adjudication clearly violates its statutory guidelines and this adversely affects a substantial property right.

The last time 25 U.S.C. § 372 was considered by the Unites States Supreme Court was 1926. Since then, the court has modified its interpretation of the Omnibus Indian Act of June 25, 1910 on the subject of review and has also expanded and modified its approach to judicial withdrawal statutes since 1926.

A person with the right of inheritance from an intestate decedent is currently denied review, while the legatee or devisee on a will is allowed review. There is not rational distinction between intestate and testate to

justify review of one, but prevent it on the other.

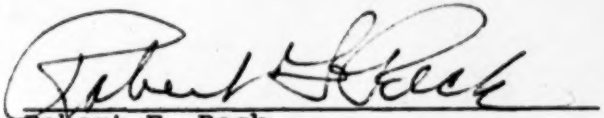
The petitioner was denied the opportunity to a fair hearing because he was denied the opportunity for a credibility evaluation of his witness when credibility was a key factor. This denial of a credibility hearing was contrary to the Administrative Procedure Act.

This is an opportune case for the Court to review a statute affecting a substantial number of citizens of Indian descent, and to extend the right to review decisions of the Secretary of Interior to those who inherit by intestate succession as well as those who take by testimentary devise, who now have the right to review.

It is also a case which merits reversal and remand for a fair hearing, including a credibility evaluation of petitioner's witnesses. Petitioner has

been denied his patrimony from birth, never knowing his father, and now cut off from recognition as his father's son.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.



Robert F. Peck
Attorney for Petitioner

ROBERT F. PECK

Bitar Building
Simpson Avenue
Hoquiam, WA
98550
[206] 533-2970

APPENDIX

TABLE OF CONTENTS OF APPENDIX

Pages

United States Court of Appeals
for the Ninth District;
MEMORANDUM . . . . . ONE and TWO

United States District Court,
Western District of Washington
at Tacoma: ORDER . . . THREE and FOUR

United States Department of the
Interior;
DECISION . . . . FIVE through FOURTEEN

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID RUSSELL HUDSON,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA, et al.,	)
	)
Defendants-Appellees.	)
	)

No. 79-4305

MEMORANDUM

Appeal from the United States District Court for the Western District of Washington, Southern Division
The Honorable Jack E. Tanner, District Judge, Presiding Argued and Submitted January 7, 1981.
Before: WRIGHT, POOLE and NORRIS, Circuit Judges

Determinations of the Secretary of the Interior under 25 U.S.C. § 372 are not subject to review in federal court.

First Moon v. White Tail, 270 U.S. 243 (1926). Enactment of the Administrative Procedures Act did not alter this rule. Johnson v. Kleppe, 596 F.2d 950 (10th Cir. 1979). Appellant has raised no constitutional claim that would remove his case from that limitation. Cf. Eskra v. Morton, 380 F.Supp. 205 (W.D. Wis. 1974), rev'd on other grounds, 524 F.2d 9 (7th Cir. 1975). Dismissal for lack of federal subject matter jurisdiction was therefore appropriate.

AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

DAVID RUSSELL HUDSON, Plaintiff, vs. UNITED STATES OF AMERICA and its Secretary of the Interior, THOMAS S. KLEPPE, VERNADINE TEED STEARNS, LOIS JEAN REED SAXTON, MILDRED REED ANDERSON and JUAN(sic) STACY REED CLEVELAND, Defendants.	)

NO. C76-227T

ORDER

Having fully considered and reviewed Defendant United States of America and its Secretary of the Interior Thomas S. Kleppe, Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to 25 U.S.C. § 372 and Defendant's Vernadine Reed Stearns, Lois Jean

Reed Saxton, Mildred Reed Anderson, and Juan(sic) Stacy Reed Cleveland, Motion to Dismiss pursuant to FRCP 12(b) for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction, and the pleadings and memorandums filed herein,

IT IS HEREBY ORDERED that said motions are GRANTED with prejudice.

Each party shall bear their own costs and attorney fees.

The clerk is directed to send uncertified copies of this Order to all counsel of record.

DATED this (5) day of (March), 1979.

(/s/ Jack E. Tanner)
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

4015 WILSON BOULEVARD

ARLINGTON, VIRGINIA 22203

ESTATE OF ALVIN HUDSON

IBIA 76-32 Decided September 2, 1976

Appeal from a decision denying Petition for Rehearing.

REVERSED.

1. Indian Probate: Evidence: Generally--225.0

   In order for an administrative law judge's finding to be upheld or sustained, the finding must be supported by a preponderance of the evidence.

APPEARANCES: Ziontz, Pirtle, Morriset, Ernstoff & Chestnut, Attorneys for Appellants, Lois Saxton, Vernadine Stearns, Mildred Anderson, and Ivan Cleveland; Bitar & Morgan, Attorneys for Appellee, David Russell Hudson.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before the Board on an appeal taken from an administrative law judge's decision denying Petition for Rehearing.

Pertinent facts relative to the matter herein are as follows:

Alvin Hudson, Quinault Allottee No. 1139, hereinafter referred to as decedent, died intestate on January 13, 1949.

On December 30, 1949, after proper proceedings, an Order Determining Heirs was issued wherein Lois Saxton, Vernadine Stearns, Mildred Anderson and Ivan Cleveland, Appellants herein and hereafter referred to as such, were found to be the heirs of the decedent.

Under date of August 21, 1968,

David Russell Hudson, hereinafter referred to as Appellee, filed a Petition to Reopen the estate with the late Hearing Examiner, Richard J. Montgomery, who had probate jurisdiction of the estate. The petition was denied by the Examiner on August 27, 1968, for untimely filing as provided by the regulations in effect at that time, 25 CFR 15.18(a).

The Appellee filed an appeal from the denial with the Regional Solicitor, United States Department of the Interior, Portland, Oregon, who thereafter on May 29, 1969, reversed the Examiner's denial and remanded the matter for further hearing.

Two hearings were held subsequent thereto by Examiner Montgomery on April 13, 1972 and April 24, 1973, wherein oral testimony and documentary evidence were presented.

Based on the record, Administrative Law Judge Robert C. Snashall on April 9, 1975, issued an order wherein he found the Appellee to be the son of the decedent and the sole heir of the decedent's trust estate. Accordingly, the Judge modified the Order Determining Heirs of December 30, 1949, by deleting therefrom the original four heirs as determined and substituted the Appellee as sole heir.

The Appellants on July 7, 1975, after a duly authorized extension of time granted by the Judge, filed a Petition for Rehearing and Reconsideration setting forth in support thereof the following grounds:

1. Allowing a late petition to reopen the estate, and entering an order reversing the original decision of the Department of Interior and determining a new heir of Alvin Hudson

is illegal and unconstitutional as more fully set out in the memorandum in support of this petition attached hereto, all parts of which are incorporated herein by reference.

2. A new trial is necessary in that the Administrative Law Judge who heard the evidence did not make the final decision.

3. The order of April 9, 1975, is not supported by the evidence adduced thus far in this matter.

4. The Administrative Law Judge erred in not applying substantive state law to determine who was entitled to take as heirs of Alvin Hudson.

5. New and additional evidence which has come to light since the original hearing should be heard. This evidence goes to two material facts involved in the case, i.e., whether or not David Paskas Hudson is,

in fact, an Indian and a member of the Quinault(sic) Tribe and the character of the decedent which is directly relevant to the paternity of Alvin Hudson.

A review of the record indicates the need to address at this time only the Appellants' contention set forth in above Item 3 to the effect that the Order of April 9, 1975, is not supported by the evidence.

The Appellee's case as we see it rests and depends entirely on the testimony of his mother, Helen Paskas Jenna, that she was raped by the decedent and that the Appellee was a result thereof. The birth certificate naming the decedent as the father of the Appellee and the court order changing Appellee's name to Hudson are likewise based on the mother's word.

It is to be noted that the subject of rape was not mentioned in the Petition to Reopen and came to light only after the petition had been granted by the Solicitor.

It was at the hearing of April 18, 1972, that the claim was first made by Mrs. Jenna that the Appellee was the result of the crime of rape. Her only reason for not reporting the alleged rape before was that she was ashamed. According to her testimony, she never divulged the incident to anyone. Not only was the alleged crime never reported or made known to anyone, the fact that she was pregnant as a result therefrom was also never made known to anyone including the decedent.

The testimony of Mrs. Jenna given some 23 years after the alleged crime raises a serious question regarding the credibility of her testimony.

This is particularly true in the absence of any corroboration.

The Judge in his decision of April 9, 1976, held that the paternity of the Appellee had been established by a "preponderance of the evidence." The Board does not agree and finds to the contrary.

[1] An examination of the record indicates the Appellee has not established his paternity by the preponderance of the evidence as found by the Judge. The Judge's finding regarding Appellee's paternity appears to have been premised or based entirely on the uncorroborated and somewhat conflicting word or testimony of Mrs. Jenna that the Appellee was the result of an alleged rape. This we do not feel meets the preponderance of the evidence standard. Lacking such preponderance, the Judge's finding to that effect cannot be upheld or sustained.

Under the circumstances attendant in this case, it does not appear that further proceedings would contribute in any substantial manner to the evidence already presented in the two proceedings held in the matter. At most, any evidence that could possibly be presented hereafter in support of the Appellee's paternity would merely be cumulative and repetitious of the evidence heretofore presented.

In view of our finding that the Judge's finding of April 9, 1975, regarding the paternity of Appellee is not supported by the evidence, we need not, as indicated elsewhere herein, consider or rule on Appellants' other contentions including the applicability of 25 U.S.C. § 371.

For the reason herein set forth, the decision of the Administrative Law Judge, dated April 9, 1975, should be

reversed and the Order Determining Heirs of December 30, 1949, reinstated.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CRF 4.1, it is HEREBY ORDERED:

(1) That the Order of April 9, 1975, is REVERSED and VACATED, and,

(2) That the Order Determining Heirs of December 30, 1949, is REINSTATED.

This decision is final for the Department.

Done at Arlington, Virginia.

(/s/ Alexander H. Wilson)
Alexander H. Wilson
Administrative Judge

I concur:

(/s/ Mitchell J. Sabagh)
Mitchell J. Sabagh
Administrative Judge